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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ENNIS FITZGERALD LAWRENCE, Defendant and Appellant.	C085286 (Super. Ct. No. 16FE012721)

A jury found defendant Ennis Fitzgerald Lawrence guilty of second degree robbery (Pen. Code, §§ 211/212.5, subd. (c))[1] and found true that he was personally armed with a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)), and that a

[1] Undesignated statutory references are to the Penal Code.

principal in the commission of the offense was armed with a firearm (§ 12202, subd. (a)(1)).

Before trial, defendant refused a plea offer of three years in state prison, which would have entailed the two-year low term for second degree robbery (§ 213, subd. (a)(2)) and the dismissal of one arming enhancement. After trial, the probation department recommended formal probation because of defendant's youth and lack of a prior record; defense counsel requested probation or the low term with the enhancements dismissed. Instead, the trial court imposed a state prison sentence of five years, consisting of the three-year middle term (§ 213, subd. (a)(2)) plus one year consecutive for each enhancement.

Seizing on a few words in the trial court's sentencing statement, defendant contends the court unconstitutionally punished him for invoking his right to jury trial. We conclude the claim is forfeited because he did not raise it below, and even if not forfeited, lacks merit. We affirm.

FACTS

The trial evidence showed that on the afternoon of May 27, 2016, defendant and one confederate robbed the victim, a pushcart vendor, on the street corner where he was working. Three men arrived in a tan Chevrolet Impala; defendant and one confederate got out while the driver remained inside. While brandishing a knife, defendant demanded money from the victim as the other confederate pointed an Intratec TEC-9 semiautomatic pistol against the victim's side. Defendant took the victim's medical benefits card and cell phone, among other things; the three then drove off in the Impala. About an hour later, police pursuing an unrelated ongoing investigation found defendant at a house where the Impala and the victim's property were also located.[2] Subsequently, the victim

[2] The trial court heard evidence in limine that defendant and the others were suspected of five robberies, but this evidence was not presented to the jury.

identified defendant in a photo lineup as the robber who wielded the knife; he also identified the Impala from a photograph and said a sweatshirt confiscated by the police was worn by defendant during the robbery. However, at trial, evidently out of fear of retaliation, he claimed to be unsure whether defendant was one of the robbers.

DISCUSSION

The probation report stated that defendant, age 20 at the time of sentencing, had suffered for most of his life from sickle cell anemia and had no prior criminal or juvenile record. However, he had a lengthy disciplinary record while in custody for the instant offense, and according to police was a validated Meadowview Blood gang member. The report noted defendant's age and lack of a prior record as factors in mitigation, but noted as a factor in aggravation the planning, sophistication, or professionalism with which the crime was conducted. Along with formal probation, the report recommended a maximum period of incarceration as a punitive measure.

Defendant's statement in mitigation asserted that defendant, who came from "a very successful and law abiding household," had "no apparent predisposition" to commit the crime charged but "was induced by others to participate." Defendant also asserted that he "acknowledged wrongdoing at an early stage of the proceedings" and wanted to enter a no contest plea in return for probation, but the trial court would not consent to probation at that stage due to his jail writeups.

The prosecutor's statement in aggravation alleged that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness"; "[t]he defendant was armed with or used a weapon at the time of the commission of the crime"; the victim was "incredibly vulnerable" as a street vendor and "was also likely targeted due to his unlikeness [*sic*] of reporting this to the police"; "[t]he manner in which the crime was carried out indicates planning, sophistication, or professionalism"; and "[t]he defendant has engaged in violent conduct that indicates a serious danger to society." The victim suffered continuing

"mental and emotional harm," shown by the fear he exhibited for his own and his family's safety. Records from defendant's cell phone indicated that the day before the robbery he had come into possession of the assault rifle and "was looking for a 'flash.' " The prosecutor requested a five-year state prison sentence.

After stating its tentative intent to impose a prison sentence and hearing argument, the trial court gave the following reasons for its intended five-year sentence:

"This is a decision that I have thought long and hard about. I take my responsibilities very seriously. And I am mindful of [defendant's] age and also his medical condition that you have put in your statement in mitigation. I read the letters from the family members and also your description of his life.

"I have to tell you, the fact that the gentleman comes from a middle-class family, the fact that his sister is a college graduate, the fact that he has a lot of family support, in my mind, just makes his decisions all the more shocking.

"And it is true that he does not have prior criminal convictions, but this one is a very serious one. And I also read the probation report very thoroughly about his conduct in custody.

"The gentleman appears not to be getting the point that the rules apply to him just like they apply to everyone else. The facts of this case, I think, are particularly shocking.

"We have a victim who is eking out a living, pushing a push cart down the street, selling his food items after he's off work from his regular job, while on the other hand, [defendant] seems content to wallow with his associates and his friends and to frighten people.

"So I find myself short of sympathy with the argument that youth excuses everything. In this case, I do not think it excuses everything, and I think that the facts of this case were particularly concerning, particularly shocking.

"And I think that because he does not have a prior record, I'm not going to impose high term, but I think that a midterm prison sentence is absolutely appropriate. I'm going

to deny probation. *I think it would be wrong to do probation after we've gone through a trial and the jury has spoken on these particular facts*." (Italics added.)

Defense counsel did not object that the trial court's last sentence showed the court was punishing defendant for invoking his right to jury trial. On appeal, however, defendant argues exactly that. He insists the contention is properly before us, but claims that if counsel's silence forfeited the contention, counsel was ineffective. As we shall explain, the contention is forfeited, and counsel was not ineffective for failing to raise it because it patently lacks merit and defendant cannot show prejudice from counsel's conduct.

A trial court " 'may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.' [Citations.]" (*People v. Clancey* (2013) 56 Cal.4th 562, 575.) Thus, "[a] court may not . . . impose a sentence that conflicts with a defendant's exercise of his constitutional right to a jury trial. [Citation.]" (*In re Lewallen* (1979) 23 Cal.3d 274, 281 (*Lewallen*).) To do so violates the defendant's Fourteenth Amendment due process rights. (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 761 (*Ghebretensae*), citing *Lewallen*, at p. 278.)

To raise this constitutional claim, however, " '[t]here must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right.' [Citation.]" (*Ghebretensae*, *supra*, 222 Cal.App.4th at p. 762.) " 'The mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights.' [Citation.]" (*Ibid*.) The terms a prosecutor offered in exchange for a plea do not limit the trial court's sentencing discretion, and "[l]egitimate facts may come to the court's attention either through the personal observations of the judge during trial [citation], or through the presentence report by the probation department, to induce the court to impose a sentence in excess of

any recommended by the prosecution [or the probation department]." (*Ibid*., citing *Lewallen, supra*, 23 Cal.3d at p. 281.)

Claims of constitutional error at sentencing, like other constitutional claims, may be forfeited by failing to raise them in the trial court. (*People v. McCullough* (2013) 56 Cal.4th 589, 593 (*McCullough*); *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060; see generally *People v. Scott* (1994) 9 Cal.4th 331, 351 [waiver of sentencing error claims].) Although application of the forfeiture rule on appeal is not automatic, it will generally be applied to situations in which the claim of error requires a fact-specific determination, rather than raising a pure question of law. (See *McCullough,* at pp. 593-599.)

Whether the trial court sought to punish a defendant at sentencing because he invoked his right to jury trial is a fact-specific question, normally answered by examining the history of plea negotiations in the case and/or the court's stated rationale for its sentence. (See, e.g., *Lewallen, supra*, 23 Cal.3d at pp. 279-280; *Ghebretensae, supra*, 222 Cal.App.4th at pp. 762-763.) Because defendant failed to raise this fact-specific issue in the trial court, the forfeiture rule applies. (Cf. *McCullough, supra*, 56 Cal.4th at pp. 593-599.)

Defendant asserts trial counsel preserved the issue by arguing for probation in his sentencing memorandum and his oral statements at sentencing. We disagree. Nothing in counsel's statements put the trial court on notice that a harsh sentence could be attacked on appeal as a means of punishing defendant for going to trial. Defendant cites no authority holding that an argument for leniency in sentencing necessarily raises that claim or preserves it for appeal, and we know of none.

Having found the issue forfeited, we consider whether counsel was ineffective for not raising it. We conclude he was not.

To win reversal for ineffective assistance of counsel, a defendant must show that counsel performed below professional norms of competence and that defendant was

reasonably likely to have obtained a more favorable result absent counsel's incompetence. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Here, defendant can show neither.

First, defendant's present interpretation of the trial court's words that "it would be wrong to do probation after we've gone through a trial and the jury has spoken on these particular facts" as showing animus toward defendant because he chose to go to trial is far-fetched. From the context of the court's entire sentencing statement, in which it stressed the heinousness of defendant's crime (made more "shocking" by defendant's middle-class upbringing and family support) and his disciplinary record in jail, which showed he was "not . . . getting the point that the rules apply to him just like they apply to everyone else," it is obvious that the court was relying on "[l]egitimate facts [that came] to the court's attention . . . through the personal observations of the judge during trial [and] through the presentence report of the probation department." (*Lewallen, supra,* 23 Cal.3d at p. 281, cited in *Ghebretensae, supra,* 222 Cal.App.4th at p. 762.)

Furthermore, in deciding to impose the middle term on the robbery count and not to strike any enhancement, the court expressly balanced the facts of defendant's conduct against his youth and lack of a prior record. The resulting sentence was not arbitrary, irrational, or vindictive, but was well within the court's discretion based on the relevant criteria before the court. (See *Ghebretensae, supra,* 222 Cal.App.4th at p. 762; *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.)

Given these facts, any claim by trial counsel that the court's sentencing decision was actually based on the desire to punish defendant for going to trial would have been futile. It is not ineffective assistance of counsel to fail to raise futile objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587; *People v. Price* (1991) 1 Cal.4th 324, 387.)

By the same token, defendant cannot show prejudice from counsel's failure to raise defendant's present contention. Since the trial court's sentencing decision was based on facts thoroughly established at trial and in the probation report, on which the

court had clearly made up its mind, there was no reasonable probability of a different outcome had trial counsel alleged baselessly that the court's actual motivation was hostility toward defendant's decision to go to trial.

DISPOSITION

The judgment is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Duarte, J.